STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

LEONARD R. PONTE)
)
VS.) W.C.C. NO. 01-00197
)
BECHTEL CORPORATION)

DECISION OF THE APPELLATE DIVISION

CONNOR, J. This matter is before the Appellate Division on an appeal of the employee from a decision and decree of the trial judge that was entered on March 30, 2004. The petition before the trial judge was an employee's petition for the continuation of workers' compensation benefits pursuant to R.I.G.L. §28-33-18.3(a)(1). In this petition, the employee alleged that his partial incapacity posed a material hindrance to him obtaining employment within his limitations. At the conclusion of the trial of this matter, the trail judge rendered a decision and decree which found that the employee had failed to prove by a fair preponderance of the credible evidence that his partial incapacity posed a material hindrance to obtaining employment suitable to his limitations. The trial judge, therefore, ordered that the petition be denied and dismissed.

The record reveals that the employee suffered a herniated cervical disc at C5-C7 on September 30, 1994. He was paid partial incapacity benefits following this injury. On December 19, 1995, a finding was made that the employee had reached maximum medical improvement, and subsequent to that his weekly partial incapacity benefits were reduced to seventy percent (70%). In a subsequent petition, the employer attempted to further reduce the

employee's benefits in accordance with R.I.G.L. §28-33-18(c), and although the trial judge granted the employer's request, her decision was later reversed by the Rhode Island Supreme Court. In the matter presently before us, the employee, upon being notified by the employer that his workers' compensation benefits for partial incapacity were coming to an end, filed this petition for continuation of his benefits pursuant to R.I.G.L. §28-33-18.3(a)(1).

At the time of the employee's testimony before the trial court, he was sixty-one (61) years old. He received workers' compensation benefits until February 2001, when his benefits were stopped because he had reached 312 weeks of partial incapacity benefits. At the time of his injury he had been working for thirty-six (36) years as a boilermaker. He described his job as very physically demanding, requiring him to lift heavy items such as steam generators and boilers. The employee testified that the injury that he suffered to his neck, which affects not only his neck but also his right arm, has prohibited him from being able to return to work as a boilermaker. At the time of his testimony, the employee stated that he could not perform any type of work. He stated that he takes medication during the course of the day that makes him sleepy, and this prohibits him from being able to hold down any regular employment. He stated that in addition to having medical problems involving his neck and arm as a result of this injury, he also has other non-work-related medical problems affecting his psyche, his pulmonary system, his low back, his hands, his eyes, and his right knee.

The employee stated that his formal education was to the eleventh grade, and he never received his GED. The employee stated that during his years as a boilermaker, he also worked as a foreman and a union steward. He stated that he also has some experience working as a welder.

The employee stated that since the time of his injury he does do some work around the house and he can occasionally cut the lawn and wash his car. He stated that he can also tend to a garden. He testified that he is able to drive a car and did in fact drive himself to court on the day of his testimony. By the employee's own admission, he wakes up in the morning at 6:00 and retires at 9:00 or 10:00 at night. He is able to sit for up to forty-five (45) minutes without having to change positions, and he is able to walk for twenty-five (25) minutes before he tires. He is also able to mow the lawn at his own pace, do small loads of laundry, and lift light bags of groceries. He stated that he has not worked since 1995 in any capacity, nor has he looked for work.

The employee testified that he has seen Mr. Albert Sabella, a vocational counselor, on two (2) occasions for a vocational evaluation, and he has also seen Judith Drew on one occasion for the same purpose. He stated that he has not met with any vocational counselor on his own, nor has he ever asked anyone to assist him in obtaining employment suitable to his limitations. The employee, at the time of his testimony, was receiving Social Security disability benefits and had no plans to look for any type of work whether on his own or with vocational assistance. He also had no interest in obtaining any training to allow him to perform alternative suitable work. The employee denied that he was ever offered any vocational assistance or an opportunity to get his GED when he had treatment at the Donley Center in 1995, but those records indicate otherwise.

Judith Drew testified in this matter as a certified vocational rehabilitation counselor. She stated that she has been engaged in the field of vocational rehabilitation for over twenty-six (26) years, and she evaluated the employee on May 10, 2002. Ms. Drew performed an employability assessment to determine if the employee had transferable skills. She stated that she conducted

two (2) tests on the employee, specifically, the Wide Range Achievement Test, which is a measure of individual aptitude and basic math, and the Wonderlic Personnel Test, which is used by companies to determine an individual's problem solving ability. Ms. Drew stated that the employee, with respect to his math ability, scored at the level of a sixth grade student, but as far as his spelling and reading were concerned, he scored at the level of a high school student. She stated that his scores in all categories were average to low average but were not below average. Ms. Drew stated that with regard to the Wonderlic test, the employee scored in the 18th percentile, which means that he scored better than eighteen percent (18%) of the average population in his ability to perform independent problem solving and reasoning. Based on her interview with the employee, Ms. Drew concluded that the employee had no transferable skills. She also found that the employee had a substantial loss of access to the labor market to the point where there was no work that she believed he could perform based on the combination of his education, physical ability, and lack of transferable skills. Ms. Drew stated that although most of the employee's aptitudes are average, the restricting issue for this employee is his ability to use his hands manually, repetitively and within certain weight restrictions. She testified that once an employee gets to a light or sedentary work capacity, it limits an individual's employability, and there is really a need for further education to perform sedentary type jobs. It was Ms. Drew's opinion that the employee's partial incapacity posed a material hindrance to obtaining employment suitable to his limitations.

Ms. Drew stated that when she interviewed the employee, other than looking into performing some inspecting work within his union, she is not aware of any other attempt that the employee made to obtain employment. She stated that because she deemed the employee unemployable, she did not attempt to find him work. Ms. Drew agreed that had the employee

obtained his GED, it would have potentially improved his employability. She further agreed that it certainly would have helped and been in his best interest to obtain his GED. Ms. Drew agreed that a person's motivation to return to work is critical in terms of their employability. She agreed that the employee has done nothing in terms of getting himself back to work, and has demonstrated no motivation to return to work by looking in newspapers, talking with people, or completing any job applications.

Ms. Drew testified that the doctors' reports that she reviewed indicates that the employee is capable of light duty work. She agreed that the employee's age of sixty-one (61) in and of itself did not make him unemployable. Ms. Drew also agreed that the employee's absence from the labor force for seven (7) years made it very difficult for him to re-enter the labor market. Ms. Drew stated that the employee is a very pleasant man who makes a very nice appearance, which would be advantageous in a job interview. She stated that with regard to the Rhode Island labor market, she reads *The Providence Journal* and *The Providence Business News* on a regular basis, and she has access online to the Rhode Island labor market through the Office of Employment Services. She stated that the labor market in the latter part of the 1990's was heated and intense, which means that there was a lot of work available and a diversity of work available in the market. She testified that despite this heated market, the employee made no attempt to find work.

Audrey Bell testified as a vocational rehabilitation specialist who interviewed the employee on behalf of the employer in February 2001. She issued a report dated February 21, 2001, and a supplemental report dated October 7, 2002. She interviewed the employee and took a history from him with regard to his work as a boilermaker. She also reviewed medical records with regard to his treatment for the effects of the injury that he suffered to his neck and right

upper extremity. She stated that as part of her evaluation of the employee she took an educational history which revealed he had an 11th grade education, and she also took a financial history, at which time she noted that he had been receiving workers' compensation benefits and had been approved for Social Security Disability benefits and a union pension. At the time that she evaluated him, the employee considered himself to be retired as of 1995. She stated that she reviewed records from the Donley Center that indicated that the employee chose not to participate in vocational rehabilitation. Ms. Bell stated that the employee was able to read and write English, and he was able to express himself verbally, and he presented well. She noted that the obstacles to his vocational rehabilitation included that he was receiving Social Security benefits and a union pension, and that he had previously declined interest in vocational services. She also stated that because he did not graduate from high school or have a GED, and he had not worked since 1995, this would present a detriment to him in finding work. It was her opinion that the employee was not a good vocational candidate because he referred to himself as being retired and he was not interested in participating in vocational rehabilitation.

It was Ms. Bell's opinion that despite not being a good vocational candidate, the employee is employable because he is articulate, presentable, cordial, and able to read and write English. He also has the ability to express himself verbally, has good interpersonal skills and can learn new tasks. She stated that the fact that he sustained a job for thirty-six (36) years was also a positive factor. It was her opinion to a reasonable degree of certainty that the employee's injury did not pose a material hindrance to obtaining employment suitable to his limitations.

Ms. Bell stated that she agreed with Ms. Drew that the employee does not have any transferable skills; however, she maintained her position that he is employable. She stated that because someone has no transferable skills does not mean that they are unemployable. She

stated that what this means is that the employee cannot use the skills that he has gained from his thirty-six (36) years of experience and transfer those skills to another occupation. She stated that the employee could learn a skill or work in an unskilled position if he so chose.

It was Ms. Bell's opinion that the employee was capable of sedentary to light work, and he should consider an entry level unskilled occupation. She also indicated that prior to beginning a job, ergonomics should be assessed to maximize his ability to sustain employment. She agreed that such employment would pay him far less than his pre-injury wage of Twenty-three and 75/100 ($23.75) Dollars an hour. Ms. Bell agreed that the employee has been significantly impacted by his injury in his ability to obtain employment, but in her opinion he has not been materially hindered. Ms. Bell stated that although he may be significantly impacted in his ability to work, he is employable.

The report of Judith Drew dated June 14, 2002 with regard to her vocational assessment was admitted into evidence by the employee. Her report indicates that she reviewed medical records from several physicians with regard to the employee's restrictions concerning his return to work. According to these records, on September 9, 1995 Dr. Parziale diagnosed the employee with a C5-6, C6-7 herniated disc with cervical arthritis, and opined that he could perform light duty work which did not require lifting beyond 30 pounds, prolonged neck extension or repetitive push/pull activities with the right hand or arm. Dr. Edward Madden as of April 3, 1997, reported that the employee could work in a light duty capacity and diagnosed him with a bulging disc at C5-6 and C6-7 with some protrusion to the left. Dr. Madden described the employee as having a problem with numbness and paresthesias in his right hand. Dr. Tsiongas in November 1994 released the employee to work with a 30-pound lifting restriction and to try welding but not over the shoulder. Other doctors, such as Dr. James Kraeger, reported in 2002

that the employee was completely unable to return to work ever because he was treating the employee for anxiety and depression, which, according to the evidence presented, has not been established as related to the employee's work injury.

The report of Audrey Bell was entered into evidence. She issued two reports, one dated October 7, 2002 and the other dated February 21, 2001. In reviewing the medical records presented to her with regard to the employee's treatment, she noted that he has treated with several orthopedic and chiropractic physicians and had undergone a course of physical therapy. She stated that in 1994, Dr. Stutz gave the employee a release for work and ordered him to restrict lifting up to 30 pounds with no repetitious lifting with the right arm extended in front of him.

The trial judge, in considering the evidence presented in this matter, noted that the employee was a pleasant gentleman and had an excellent command of the English language. He noted that "Mr. Ponte always presented as a well dressed and polished individual, whose demeanor belied his limited formal education." (Trial dec. at 6) The trial judge found that the medical evidence presented clearly indicates that the employee is capable of light duty work as set forth in the medical reports of Drs. Stutz and Madden. It was noted by the trial judge that, in addition to the employee's treatment for this injury, he suffers from a number of medical problems that are not work-related. In his decision, the trial judge considered the testimony of Ms. Drew and Ms. Bell, and chose to accept the testimony of Ms. Bell as being more probative. The trial judge emphasized in his decision that the employee made no attempt to re-enter the workforce at any level or at any time following his injury, and he declined efforts for assistance in finding a job when offered same by the Donley Center in 1995. The trial court also acknowledged that, as the employee's expert, Ms. Drew, stated, during the late 1990's the Rhode

Island job market was heated and intense with lots of jobs available during this period of low unemployment. Trial dec. at 9. The trial judge, therefore, concluded that based on the evidence presented to him, the employee's partial disability did not pose a material hindrance to his ability to re-enter the workforce. The trial judge found that the biggest impediment to the employee finding work was that the employee himself chose not to make any attempt to reenter the workforce. The trial judge then entered the decree previously referenced, and the employee claimed his right of appeal.

The employee alleges in his reasons of appeal that the trial decision and decree is against the law and the evidence presented in this matter in that the trial judge failed to find that the employee's partial incapacity posed a material hindrance to him obtaining employment suitable to his limitations.

Pursuant to R.I.G.L. §28-35-28(a), the appellate panel is charged with the initial responsibility to review the record and determine whether the decision and decree properly respond to the merits of the controversy. The role of the Appellate Division in reviewing factual matters is, however, sharply circumscribed. In accordance with R.I.G.L. §28-35-28(b), a trial judge's findings on factual matters are final unless found to be clearly erroneous. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). The Appellate Division is entitled to conduct a *de novo* review only when a finding is made that the trial judge was clearly wrong. Id. (citing R.I.G.L. §28-35-38(b); Grimes Box Company v. Miguel, 509 A.2d 1002 (R.I. 1986)). Such review, however, is limited to the record made before the trial judge. Vaz, *supra* (citing Whittaker v. Health-Tex, 440 A.2d 122 (R.I. 1982)).

Cognizant of this legal duty imposed upon us, we have carefully reviewed the entire record of this proceeding, and we find no merit in the employee's appeal of this matter. We, therefore, deny and dismiss the appeal and affirm the findings and decree of the trial judge.

Rhode Island General Laws §28-33-18.3(a)(1) provides that when an injured worker has received weekly benefits for partial incapacity for a period of 312 weeks, he or she may file a petition with the court seeking the continuation of those benefits. The employee is entitled to the continuation of benefits if:

> "…the employee demonstrates by a fair preponderance of the evidence that his or her partial incapacity poses a material hindrance to obtaining employment suitable to his or her limitation…"

The definition of material hindrance contained in our statute applies only to injuries occurring after September 1, 1990. In Lombardo v. Atkinson Kiewit, 746 A.2d 679 (R.I. 2000), the Rhode Island Supreme Court noted that the requirement to qualify for total disability under R.I.G.L. §28-33-17(b)(2), the codification of the "odd lot doctrine," was more stringent than the burden of establishing that one's partial disability posed a material a hindrance to obtaining employment. Id. at 689. Under the odd lot doctrine, an injured worker must prove that taking into account the employee's age, education, abilities and training, he or she is unable to perform the duties of the employee's regular employment, as well as any alternative employment. Under the statute at issue in this matter, the employee need only establish that his partial disability constitutes a substantial impediment to his ability to secure employment within his physical limitations.

Our review of the record indicates that the trial judge considered the appropriate evidence in determining that the employee's injury did not pose a material hindrance or even a substantial impediment to obtaining employment suitable to his own limitations. The majority of this panel

is of the opinion that the trial judge was correct in evaluating the totality of the employee's conduct since the time that he reached maximum medical improvement in December 1995 in arriving at a decision in this matter.

It has long been held that a trial judge is uniquely qualified to both assess the credibility of a witness and to determine what evidence to accept and what to reject, because he or she is in the best position to observe the appearance of a witness, his or her demeanor, and the manner in which he or she answers questions. Davol, Inc. v. Aguiar, 463 A.2d 170, 174 (R.I. 1983). At the time of his testimony, the employee was sixty-one (61) years of age, but in 1995, when he reached maximum medical improvement, he was fifty-four (54) years old. He is personable, he has an 11th grade education, and he can read and write English. Testing performed on him indicates that his skills in reading, spelling and math are average to low average, but in no way are they below average. He also has the ability to understand directions with regard to certain tasks, and he can perform such skills better than eighteen percent (18%) of the population. All of the medical doctors that have treated the employee for the effects of this injury have concluded that he is capable of light duty work, and, in fact, the employee is able to perform certain activities in and around his home. He is also capable of driving short distances, walking up to twenty-five (25) minutes at a time, and sitting for up to forty-five (45) minutes before he needs to alter his position. He has not attempted to find work, and he declined vocational services when offered them in 1995, at a time when his own expert witness said that jobs were readily available in diverse occupations and industries. The employee presently receives Social Security Disability benefits and a union pension, and it is evident that he considers himself retired.

In arriving at his determination, the trial judge relied not only on his impressions from the testimony of the employee, but also considered his impressions of the expert witnesses that

testified before him. With regard to the expert testimony, the trial judge, as is his prerogative, chose between the testimony of two (2) expert vocational counselors and chose to rely on the testimony of Ms. Bell as opposed to the testimony of Ms. Drew in making his decision in this matter. The Appellate Division has previously noted that when there is conflicting expert evidence, a trial justice is well within his discretion to choose the evidence that he believes is more probative on the issues before the court. Vieira v. Holiday Inn at the Crossings, W.C.C. No. 99-3643 (App. Div. November 2001 - October 2002). It was certainly within the trial justice's discretion to choose to rely on those opinions of Ms. Bell over the opinions of Ms. Drew. Clearly, Ms. Bell, upon whom the trial justice relied, is a qualified vocational expert who performed a vocational evaluation on the employee and determined that there are jobs available for him within the job market should he seek to re-enter the workforce. She opined, as an expert, that the most significant issue hindering the employee from re-entry into the workforce is the fact that the employee saw himself as retired and did not wish to work. Ms. Drew, on the other hand, determined that the employee is unemployable, but in doing so, considered his age, education, abilities and training. She determined that, based on these findings, the employee's injury posed a material hindrance to his re-entry into the workforce. Clearly, our holding in Brown v. McLaughlin & Moran, W.C.C. 98-3586 (App. Div. 2001), found that this standard is appropriate when evaluating odd lot employees but not in determining what constitutes a material hindrance pursuant to R.I.G.L. §28-33-18.3(a)(1).

In reviewing the evidence that was presented to the trial judge, the fact that the employee made no attempt to find work was well-established by the testimony of the employee and the vocational experts and is certainly well supported in the evidence presented to the trial judge. The medical evidence clearly indicates that the employee's physicians say that he is partially

disabled, and they would allow him to perform various types of work. The restrictions set by Drs. Stutz and Madden and several other physicians place weight restrictions on the employee's lifting activities, as well as some restrictions as to repetitive work with his right upper extremity; however, he is otherwise unlimited in terms of his ability as it pertains to the effects of his work injury. The employee may have other medical problems that preclude him from working, but these factors cannot be taken into consideration as we are dealing with a material hindrance that only pertains to the impact of the work injury on the employee's ability to re-enter the workforce.

Based on our review of the record, we find that the conclusions of the trial judge are well supported by the evidence presented, and, as is the trial judge's prerogative, he chose to rely on the opinions of one expert as opposed to those of the other. This is certainly within his discretion, and we cannot interfere with that discretion unless we find that his reasoning was otherwise faulty. We concur with the trial judge's conclusion that the greatest impediment to the employee's re-entry into the workforce was the fact that he had no desire and made no attempt to find suitable work.

For the aforesaid reasons, the employee's appeal is denied and dismissed, and we affirm the trial judge's decision and decree. In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed, shall be entered on

Ricci, J. concurs. Olsson, J. dissents.

ENTER:

_____
Connor, J.

_____
Ricci, J.

DISSENTING OPINION

OLSSON, J. After exhaustive review of the record and considerable deliberation, I must respectfully disagree with the majority's decision in this matter. The nature of the evidence required to satisfy the standard set forth in R.I.G.L. § 28-33-18.3(a)(1) has been the subject of much debate and discussion among attorneys and my colleagues since it was enacted. Perhaps this case will be the impetus for the Legislature or the Rhode Island Supreme Court to provide us all with some much needed guidance and clarification.

The trial judge in the present matter denied the employee's petition, stating that the hindrance to obtaining employment was the employee's own election to remove himself from the workforce and his refusal to seek employment on his own or to engage in rehabilitative services which would assist him in securing employment. In addition, the trial judge cited the testimony and reports of Audrey Bell in support of his determination. I believe that the trial judge's focus on the employee's failure to search for employment or seek out vocational rehabilitation services is incorrect in this situation. Furthermore, I found the statements of Ms. Bell to be inconsistent and lacking in adequate foundation.

The parties introduced a number of medical records and reports covering a period from approximately October 1994 to January 2003. The consensus among the various physicians and

rehabilitation providers is that, as a result of his work-related injury, the employee has a permanent partial disability with restrictions of no lifting more than thirty (30) pounds, no lifting above waist level, no prolonged neck extension, no repetitive push/pull activities, and no overhead work. Based upon this information and his own testimony, it is not disputed that Mr. Ponte has the physical ability to do some tasks and that there is some job out in the world that he could perform.

Ms. Bell, the vocational rehabilitation counselor presented by the employer, initially interviewed the employee on February 20, 2001 and produced a report dated February 21, 2001 regarding his rehabilitation potential. Ms. Bell did not perform any testing but determined that, because he had worked as a boilermaker, Mr. Ponte could read blueprints and use arithmetic and shop geometry to estimate amounts of material required. These assumptions were derived from the Guide for Occupations Exploration, a reference tool utilized by Ms. Bell and there is no indication they were confirmed by the employee. In fact, Mr. Ponte stated that he learned his trade on the job prior to any formalized apprenticeship program. The testing administered by Judith Drew, the employee's vocational expert, indicated that his mathematical aptitude was only at a sixth grade level. Furthermore, the test results regarding reasoning and problem solving skills were also at the low end of average indicating that Mr. Ponte was only qualified for rote jobs.

Ms. Bell further indicated that the employee "appears to have the ability to learn new tasks," although she provides no explanation for this conclusion. In her initial report, she described his employment opportunities as follows:

> "Should Mr. Ponte decide that he would like to return to work in an occupation within his restrictions (sedentary to light duty), he should consider an entry level, unskilled occupation. These often are bench work occupations or light retail work such as cashier in a

> self service facility. Prior to beginning a job, ergonomic considerations should be assessed to maximize the ability to sustain employment. Wages are anticipated to be below his preinjury wage of $23.75/hr."

Er's Exh. A, p. 4. The inclusion of bench work jobs, which generally involve primarily repetitive upper extremity work, apparently fails to take into consideration the restrictions on repetitive use of his right upper extremity and prolonged neck extension imposed by Mr. Ponte's physicians as a result of his work injury.

During her testimony regarding this report, Ms. Bell stated that she did not feel there was anything that the employee could do in the work force. Tr. at 281. However, she then testified that she believed he was employable based on the fact that he was well-spoken, presentable, cordial, able to write English, and had worked fairly continuously in the same type of job for thirty-six (36) years. She cited these same factors in support of her opinion that his disability did not pose a material hindrance to obtaining employment. Tr. at 282. On cross-examination, she did acknowledge that the work injury had caused a significant impact on Mr. Ponte's employment opportunities, but she maintained that it did not prevent him from returning to some type of occupation. Tr. at 307. She described the "significant impact" as the necessity of looking for a different type of job than he had previously performed and also earning less money. Tr. at 311.

Ms. Bell submitted a second report dated October 7, 2002 after reviewing the report of Ms. Drew. She subsequently reviewed the testimony of Ms. Drew as well. In her second report, Ms. Bell acknowledged that "transferability has been significantly impacted, access to the labor market reduced and earnings potential decreased," as a result of the effects of the employee's injury. She described his employment options as follows:

> "Although related or similar occupations may not be available, an

> entry level position with an employer willing to offer on the job training may be feasible."

Er's Exh. B, p. 2. She did not specifically address the results of the testing administered to the employee by Ms. Drew.

A "hindrance" is synonymous with an impediment, an obstruction, a barrier, an obstacle, or interference. Something is "material" if it is significant or important. A "material hindrance" to obtaining employment suitable to one's physical limitations would present a significant impediment or obstacle to one's access to a reasonable number of jobs in the local market, as well as one's ability to compete for a position, be hired, and sustain employment in that position. The issue to be addressed in a petition requesting the continuation of benefits under R.I.G.L. § 28-33-18.3(a)(1) is not whether the employee is capable of performing the tasks required in some hypothetical job, but whether the disability resulting from his work injury significantly interferes with the employment opportunities available to him, and his ability to be hired in a position that he can perform consistently.

The testimony and reports of Ms. Bell reveal inconsistent statements and do not provide an adequate foundation for the conclusion that Mr. Ponte's partial disability is not a material hindrance to obtaining employment suitable to his limitations. Ms. Bell's opinion is that the partial disability has not rendered Mr. Ponte incapable of working in some type of job. *See* Tr. at 311. However, as noted above, that is not the issue in this case. Prior to his work injury, Mr. Ponte worked in a skilled, heavy labor job as a boilermaker for thirty-six (36) years, earning in excess of Eight Hundred and 00/100 ($800.00) Dollars per week plus benefits. After his work injury, he is limited to some type of entry level, unskilled work at significantly less wages. Ms. Bell does not provide any information as to the availability of jobs that would be suitable for Mr. Ponte, nor does she render any opinion as to the likelihood that Mr. Ponte would actually be able

to secure such a position, assuming he actively pursued employment. When considered in their entirety, the testimony and reports of Ms. Bell actually indicate that Mr. Ponte's work injury does pose a material hindrance to his ability to obtain employment which would be suitable to his limitations.

The majority of this panel, the employer and the trial judge focus on the fact that Mr. Ponte has not attempted to work since shortly after his injury, has not made any effort to seek employment, and has not participated in any rehabilitation program which would assist him in finding work. The trial judge specifically found that the hindrance to finding employment was the employee's decision to remove himself from the workforce. I disagree with this assessment and the trial judge's reliance on this factor in denying the employee's petition.

The statute in question, R.I.G.L. § 28-33-18.3(a)(1), does not impose a duty on the employee to seek employment as a condition to the continuation of weekly benefits. An unsuccessful job search may be considered as evidence, and is perhaps the most persuasive evidence, to support the assertion that an employee's partial disability poses a material hindrance to obtaining suitable employment. *See* Conte v. Fleet Financial Group, W.C.C. No. 99-05648 (App. Div. 7/22/04); *cert. denied* 10/12/04. However, the failure to seek out employment cannot be the basis for denying a request to continue benefits under R.I.G.L. § 28-33-18.3(a)(1) simply because we find it distasteful to "reward" such a lack of effort to find and accept any type of work. The degree of motivation or lack thereof, to search for employment is irrelevant in the present case.

The employer and the trial judge cite the decision of the Appellate Division in Corbin v. Apogee USA, Inc., W.C.C. No. 99-00343 (App. Div. 12/8/00), in support of their position that Mr. Ponte's lack of effort in seeking employment or rehabilitative services makes it impossible

to determine whether his partial disability is materially hindering his ability to find employment. I believe this reliance is misplaced as the circumstances of Corbin are clearly distinguishable.

The Corbin case involved a forty (40) year old employee who injured his back while employed as a working supervisor in a woodworking shop where he had worked for eight (8) years. He had carpentry, design and supervisory skills, despite his ninth grade level mathematical skills and twelfth grade reading and writing skills. He had failed to participate in three (3) rehabilitation programs developed for him, one (1) of which was court-ordered. The only vocational expert presented testified that the employee was unemployable, but the trial judge did not find his opinions persuasive because they were based upon the employee's own perception of his condition as totally disabled, which was contradicted by the medical evidence in the record. Citing all of these factors, the trial judge denied the employee's request to continue his benefits.

Clearly, the employee in Corbin had greater rehabilitation potential than Mr. Ponte. Mr. Ponte was fifty-three (53) years old at the time of his injury on September 30, 1994. In December 1995, his condition had reached maximum medical improvement and he was partially disabled. His only relevant work experience was heavy labor as a boilermaker and welder. Both vocational experts acknowledged that he has no transferable skills. In addition, the testing administered by Ms. Drew indicated that his math and problem solving skills are only minimal. Mr. Ponte was never subject to any order of the court to participate in a rehabilitation program and neither Ms. Drew nor Ms. Bell recommended vocational retraining at his age. These facts all distinguish Mr. Ponte's case from the circumstances of the Corbin case.

The trial judge and the majority also cite the testimony of Ms. Drew that the job market in the 1990's was "heated" in support of the contention that there were plenty of jobs available to

Mr. Ponte. However, Ms. Drew qualified this statement as to the type of jobs available in response to a follow-up question by stating they were "[m]ostly the larger growth segment wages in the service industry and in the dot coms industry." Tr. at 260. It is unclear that Mr. Ponte was qualified for or physically capable of performing these types of jobs.

In addition, the majority expresses concern that Ms. Drew considered the employee's "age, education, abilities and training" in arriving at her conclusion that the effects of his work injury posed a material hindrance to obtaining suitable employment. However, to at least some degree, the employer must take the employee as it finds him. Admittedly, physical ailments or conditions not directly related to the effects of the work injury cannot be factored into the determination. However, can we really say that we should completely disregard Mr. Ponte's advanced age, limited education, and lack of transferable skills in this circumstance? We should view him as though he was twenty-five (25) years old, with unlimited education, and a diverse range of job skills? If we looked solely at his physical limitations caused by the injury, I suppose he could physically perform the job of a judge, but clearly he is not qualified to do so. His job opportunities are clearly limited by his "age, education, abilities and training" and it seems inappropriate not to consider them to some degree.

Ms. Drew explained the basis for her opinion that Mr. Ponte had a significant, or even total, loss of access to the job market:

> "In fact, the computerized program that I used I said most of his aptitudes were average – in the average range. The restricting issue was his ability to use his hands bimanually, repetitiously and the weight restrictions. Once you get in to a lighter, sedentary work capacity, you are beginning to limit the individual's employability and you really need further education especially for sedentary jobs to be successful."

Tr. at 226.

The focus of the inquiry in this matter was not whether Mr. Ponte is physically capable of doing some type of hypothetical job, but rather what is the likelihood that he can get a job that he is able to consistently perform and how difficult is it for him to get such a job? Based upon the foregoing discussion, I find merit in the employee's appeal and agree with his assertion that the trial judge erred in his interpretation and application of the standard set forth in R.I.G.L. § 28-33-18.3(a)(1). Under that statutory provision, the employee must simply establish by a fair preponderance of the evidence that the residual effects of his work injury significantly impede his ability to obtain and sustain employment suitable to his limitations. The evidence in the record before this panel, including the statements of Ms. Drew, and even Ms. Bell, supports this contention in Mr. Ponte's case. I would, therefore, grant the employee's appeal and reverse the decision of the trial judge.

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Olsson, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

LEONARD R. PONTE)
)
VS.) W.C.C. 01-00197
)
BECHTEL CORPORATION)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the petitioner/employee and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on March 30, 2004 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Connor, J.

_____
Ricci, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Michael J. Farley, Esq., and Michael D. Lynch, Esq., on

_____